

July 3, 2012

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VIA EMAIL AND HAND DELIVERY

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VIA EMAIL ONLY

Re: Submission of Evidence and Policy Statements in Administrative Civil Liability
Complaint R5-2012-0515 in the Matter of Del Mar Farms, Del Mar Farms, Jon
Maring, Lee Del Don, and Bernard N. & Barbara C. O'Neill Trust

Dear Messrs. Landau and Mayer:

Somach Simmons & Dunn represents Del Mar Farms and Jon Maring (Del Mar Farms) in the above-referenced matter (hereafter referred to as "ACL Complaint R5-2012-0515"). In accordance with the hearing procedures issued by your office, this letter constitutes the Evidence and Policy Statements of Del Mar Farms in response to ACL Complaint R5-2012-0515, which seeks a penalty of \$123,191 for alleged violations of the Coalition Group Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (Conditional Waiver).

INTRODUCTION

The circumstances leading to Central Valley Regional Water Quality Control Board (Regional Board) staff's decision to issue ACL Complaint R5-2012-0515 are not typical of the approaches taken in regard to similar alleged violations of turbidity standards by other dischargers subject to the Conditional Waiver. At its core, this is a substantial penalty being issued to an entity that had only recently leased the properties in question for an initial term of three years, and that has since addressed the alleged source of the violations by installing a drip-irrigation system. More specifically, Del Mar Farms entered into a lease to operate the properties in question in October of 2010 for which the first crop-year was the 2011 crop-year. (See September, 17, 2010 Lease between Bernard N. and Barbara C. O'Neil Trust and John E. Maring and/or Zachary J. Maring, attached hereto as Exhibit A.) On June 1, 2011, Regional Board staff state that an alleged violation was brought to Del Mar Farms' attention through an informal, oral communication at a Westside San Joaquin River Watershed Coalition (Coalition) meeting. In response, Del Mar Farms indicated that it intended to install sub-surface drip irrigation before the next growing season. It is not reasonable to expect Del Mar Farms to convert the properties in question to drip irrigation control technology in the middle of the crop season given that the installation of buried pipe and drip lines cannot be completed without damaging the tomato crop. (July 3, 2012 Memorandum to Theresa A. Dunham from Michael J. Day, P.E., Provost & Pritchard, Subject Technical Memorandum to Regional Water Board's Administrative Civil Liability Complaint Issued to Del Mar Farms,

attached hereto as Exhibit B (hereafter referred to as “Day Technical Memo”), at p. 3.) Del Mar Farms installed the drip system at the first reasonable opportunity, which was after the 2011 harvest and prior to the 2012 planting. Yet, despite these appropriate and reasonable efforts, Regional Board staff proposed a \$123,191 administrative civil liability for three alleged turbidity violations, all of which occurred during the 2011 crop season.

Moreover, ACL Complaint R5-2012-0515 was issued without giving Del Mar Farms the opportunity to respond through progressive enforcement mechanisms such as a Notice of Violation, Water Code section 13267 Order, a Cleanup and Abatement Order, or any other informal enforcement method available to Regional Board staff. This is highly unusual in the context presented and contrary to both the Regional Board’s stated preference for progressive enforcement and fair and consistent implementation of the state’s Water Quality Enforcement Policy (Enforcement Policy).

Finally, ACL Complaint R5-2012-0515 was issued without sufficient evidence that discharges of sediment from Del Mar Farms are in fact responsible for the alleged turbidity and sediment violations. The relevant facts are generally set forth in ACL Complaint R5-2012-0515 and need not be repeated here. However, there are a few notable areas in which additional information and context is warranted as part of this response. Del Mar Farms does operate the parcels as shown in Attachments A and B to ACL Complaint R5-2012-0515), and irrigation return flows from Del Mar Farms did drain into the Amaral Line on the days in question. As noted in ACL Complaint R5-2012-0515, the Amaral Line is part underground pipeline, part open ditch, and runs approximately four miles from Del Mar Farms’ parcels to a discharge point on the San Joaquin River. However, as the Regional Board can clearly see from the delineated area noted in ACL Complaint R5-2012-0515 Attachment B, and the maps attached to the Day Technical Memo, the Del Mar Farms’ properties are (1) at the very “beginning” of the Amaral Line as it relates to the line’s ultimate termination point at the San Joaquin River, (2) there are numerous other agricultural operations along the Amaral Line between Del Mar Farms’ properties and the San Joaquin River that use water flowing through the line as an irrigation source, and (3) the Amaral Line is also a drainage facility for these other properties down-gradient of the Del Mar Farms’ properties. (Day Technical Memo, pp. 4-5.) In light of the complexities with the system, it is difficult to ascertain with any certainty the actual impact that discharges from Del Mar Farms may have on the San Joaquin River.

DISCUSSION

A. Del Mar Farm’s Discharge Alone Could Not Have Contributed to Exceedences of Sediment Water Quality Objectives

ACL Complaint R5-2012-0515 is inappropriate and unwarranted under the circumstances because Del Mar Farm’s discharge was of insufficient quantity to be responsible for the alleged water quality exceedances that form the basis for the imposition of liability. Specifically, ACL Complaint R5-2012-0515 claims that discharges from the Del Mar Farms’ properties in question caused or contributed to a violation of basin plan water quality objectives for turbidity and/or suspended sediment. (See ACL Complaint R5-2012-0515, pp. 6-7.) The turbidity water quality objective in question is, “[w]here natural turbidity is between 5 and 50 NTUs, increases shall not exceed 20 percent.” (Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Basin Plan), p. III-9.00.) The sediment water quality objective relied in ACL Complaint R5-2012-0515 is a narrative objective that states, “[t]he suspended sediment load and suspended sediment discharge rate of

surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.” (*Id.*, p. III-7.00.)

With respect to the alleged turbidity violations on May 19 and July 6, flow differentials between the San Joaquin River and at the outfall indicate that increases in river turbidity, assuming that the Regional Board’s turbidity measurements at the edge of the Del Mar Farms’ properties are accurate, would be less than of 1% after complete-mixing occurs. (Day Technical Memo, p. 6.) In other words, even assuming that the edge-of-field turbidity measurements for the Del Mar Farms’ properties represented turbidity measurements at the San Joaquin River outfall, and that the outfall flows were at the 5.3 cfs level as calculated, the amount of flow would not be sufficient to increase river turbidity by more than 20%. (*Ibid.*)

With respect to the alleged sediment water quality violations, ACL Complaint R5-2012-0515 makes general accusations but fails to provide any findings or evidence to support these generalized accusations. Specifically, ACL Complaint R5-2012-0515 cites to no evidence that suggests that sediment from the Del Mar Farms’ properties has caused a nuisance as defined by the Water Code (see section C.4 below), or adversely affected beneficial uses. For example, ACL Complaint R5-2012-0515 claims to rely on photographic evidence for the alleged July 19 event, and that discharges from the Del Mar Farms’ properties caused or contributed to exceedances of the objective in the San Joaquin River. (ACL Complaint R5-2012-0515, p. 6.) However, the photographic evidence provided in appendices C and F contain no photos of the San Joaquin River on this date, and there are also no water quality samples from the San Joaquin River for this event. Rather, appendices C and F include photos of return flows at the edge-of-field, and a photo showing that the return flows are used by others. (See photos 1 through 5 for the 19 July 2011 event.) Accordingly, ACL Complaint R5-2012-0515 cites to no evidence to support its findings that discharges from the Del Mar Farms’ properties in question caused or contributed to violations of water quality objectives in the San Joaquin River.

Regional Board staff also make an inappropriate assumption that return flows from the Del Mar Farms’ properties was entirely responsible for the sediment outflow from the Amaral Line to the San Joaquin River. Given that numerous agricultural operations down-gradient from the Del Mar Farms’ properties use water flowing through the Amaral Line for irrigation, and the drain for their own discharge, such an assumption is contrary to the drainage and irrigation dynamics in the area. (See Day Technical Memo, pp. 4-5.) The technical support and analysis to support this conclusion is contained in the Day Technical Memo, which includes a number of findings based upon his review of Regional Board records, records of the Central California Irrigation District (CCID), his observation of how fields in the area are irrigated and drain, and from his 30 years of experience with irrigation and drainage.

B. The Enforcement Policy Is Not Being Applied in a Fair and Consistent Manner as Required by the State Water Quality Enforcement Policy

Based on the information provided above, Del Mar Farms contends that there is no basis for issuance of an ACL. However, even if Regional Board staff can demonstrate the necessary direct connection linking the quantity and quality of Del Mar Farm’s discharges to the Amaral Line with the alleged exceedances at the outfall of the Amaral Line in the San Joaquin River, the circumstances still do not warrant the issuance of an ACL in this case. As shown in other cases factually similar to those presented here, a policy of progressive enforcement as it relates to alleged violations of the Conditional Waiver encourages the use of less formal mechanisms and other progressive enforcement actions prior to assessment of

civil liability. Fair and consistent enforcement under the Enforcement Policy requires as much.

Given the factual circumstances presented in ACL Complaint R5-2012-0515, and the manner in which similar circumstances have been addressed by the Regional Board in the past, Del Mar Farms contends that the Enforcement Policy is not being applied fairly or consistently as compared to other similarly situated dischargers engaging in similar activities. Specifically, the Enforcement Policy states that, “[i]t is the policy of the State Water Board that the Water Boards shall strive to be fair, firm, and consistent in taking enforcement actions throughout the State, while recognizing the unique facts of each case.” (Enforcement Policy, p. 2.) In the limited other instances where ACLs have been issued against agricultural operations that operate under the Conditional Waiver, such operations have been provided an opportunity to correct violations over a period of time through the use of Cease and Desist Orders, Water Code section 13267 Orders, and/or Notices of Violation (NOVs) prior to the issuance of an ACL. In stark contrast, Del Mar Farms was issued no such orders or written notices prior to being issued ACL Complaint R5-2012-0515.

1. Contra Costa ACL – Discharger Receives a Water Code Section 13267 Order and Ultimately a \$15,000 Fine for Similar Turbidity Violations

As one pertinent example, in a recent enforcement action before the Regional Board (ACL Complaint No. R5-2012-0029, *In the Matter of Antonio P. and Mary R. Bettencourt*, Contra Costa County, attached hereto as Exhibit D (hereafter referred to as “Order No. R5-2012-0029”)), a relatively similar alleged violation led to the imposition of a \$10,000 fine. Order No. R5-2012-0029 was issued only after the discharger was given the opportunity to submit and implement a Water Code section 13267 Report before being subjected to potential liability.

Similar to ACL Complaint R5-2012-0515, that case involved an alleged violation of the turbidity water quality objective by raising the turbidity concentration by over 20%, and of violations of the conditions in the Conditional Waiver. (Order No. R5-2012-0029, p. 5.) Specifically, in July of 2010 staff observed sediment-laden water discharging from the Discharger’s parcel into a roadside canal, which ultimately discharges to Kellogg Creek, a tributary to waters of the Sacramento/San Joaquin Delta. The discharge had a turbidity reading of 260 nephelometric turbidity units (NTU) compared to the likely irrigation supply water, which had a turbidity of 11 NTU (an increase of over 2,000%). However, that Discharger was not issued an ACL immediately thereafter, but rather in August of 2010, the Discharger was issued a Water Code section 13267 Order requiring the submission of a technical report describing actions that will be taken to prevent future pollution discharges. The Discharger completed the technical report in January of 2011. However, in June/July of 2011 staff conducted a follow-up inspection and observed sediment-laden water with a turbidity reading of 571 NTU discharging from the Discharger’s parcel into the water conveyance system, allegedly contributing to a sediment discharge of 74 NTU into Kellogg Creek as compared to an upstream creek turbidity measurement of 24 NTU (an increase of about three fold). From these events, Regional Board staff then issued an ACL to the Discharger in January of 2012, more than one and a half years from the date of the initial investigation and discharge. Allegations levied against that Discharger are similar to those allegations against Del Mar Farms, including alleged creation of a condition of pollution or nuisance in violation of the Basin Plan, a violation of applicable water quality objectives by raising the turbidity concentration by over 20%, and an alleged violation of the conditions in the Conditional Waiver.

In contrast, ACL Complaint R5-2012-0515 was issued with no such progressive enforcement actions taken, and on a much shorter timeframe than Order No. R5-2012-0029, despite the similarity in circumstances and alleged violations. The Contra Costa Discharger was first issued a Water Code section 13267 Order requiring the submission of a technical report describing actions that will be taken to prevent future pollution discharges. No such order was issued to Del Mar Farms case. In fact, the only level of progressive enforcement involved in this case appears to have been an informal oral communication between Regional Board staff, and Jon and Zach Maring at a Coalition meeting on June 1, 2011.¹ However, the discussion was brief, and it is unclear if the communication was understood by the Marings as being part of a potential enforcement action. Moreover, Order No. R5-2012-0029 was issued more than one and a half years after the initial investigation and alleged violation, and only after two separate incidents separated by a full year were brought to light. In contrast, all of the allegations against Del Mar Farms occurred within a two month period, and involved alleged violations the source of which have been addressed through installation of a drip irrigation system. The drip irrigation system was installed as reasonably as could be expected after the alleged violations occurred. In sum, in Order No. R5-2012-0029, an agricultural discharger covered by the Conditional Waiver facing allegations of similar turbidity violations was presented with an opportunity to respond and address those violations prior to the issuance of an ACL, was only issued said ACL after similar violations occurred nearly a full year later, and the amount of that ACL was only \$10,000. In the Del Mar Farms enforcement action, Del Mar Farms was provided no opportunity to respond to a 13267 Order, a Cleanup and Abatement Order, or any other pre-liability enforcement mechanism, is facing an ACL less than one year from the date of the initial investigation and alleged violation (and after the point at which the source of the alleged violations had already been addressed through installation of a drip irrigation system), and the amount of that ACL is \$123,191. This does not constitute fair and consistent implementation of the Enforcement Policy.

2. Stanislaus County ACL – Discharger Receives Cleanup and Abatement Order for More Severe Turbidity Violations Than Those at Del Mar Farms and Only Receives an ACL After Almost Two Years and Numerous Violations

Another enforcement action brought by the Regional Board (ACL Order No. R5-2010-0554, *In the Matter of Stanislaus Almond Ranch, LLC and Lake Road Grizzly Ranch, LLC*, attached hereto as Exhibit E (hereafter referred to as “Stanislaus ACL”)), evidences a substantially different enforcement approach than that taken against Del Mar Farms, though the actual discharges in the Stanislaus ACL were somewhat similar, and in many ways more egregious in the Stanislaus case.²

In that case, in January and February of 2008, Regional Board staff cited to turbidity measurements of 11,200 NTU from Peaslee Creek (and the Tuolumne River) near an area in which grading activity was being undertaken while a measurement was taken of 167 NTU upstream of the graded area. Other measurements indicated turbidity of 2240 NTU near the graded area and 127 NTU upstream of the graded area. This was partially the result of “large exposed areas with eroding slopes and stockpiles of manure on-site.” (Stanislaus ACL, at p. 1.) The beneficial uses for the Tuolumne River are similar to those listed for the San

¹ A second meeting between Regional Board staff and the Marings also occurred in 2012.

² It is our understanding that this matter has been resolved through a settlement agreement, however, no such record of the settlement agreement is available at the Regional Board’s website.

Joaquin River (municipal and domestic supply; agricultural supply; water contact recreation; non-contact water recreation; warm freshwater habitat; cold freshwater habitat; migration of aquatic organisms; spawning, reproduction, and/or early development of aquatic organisms; and wildlife habitat.) The dischargers in the Stanislaus ACL were given a Cleanup and Abatement Order, Order No. R5-2008-0701, a full two years before action in the form of an ACL was issued. Ultimately, the Stanislaus ACL was issued on December 23, 2010, and contained alleged violations of the Conditional Waiver as well as the Cleanup and Abatement Order.

Del Mar Farms was provided with no such Cleanup and Abatement Order and was issued an ACL on a much shorter timeline, despite the fact that in many ways the violations alleged in the Stanislaus ACL appear to more severe than those alleged in ACL Complaint R5-2012-0515. Specifically, the property involved in the Stanislaus ACL drained to an unnamed tributary of Peaslee Creek, which is a tributary to the Tuolumne River in an area that had been designated as a spawning area for several fish species and had also been identified as winter steelhead and Chinook habitat. (Stanislaus ACL, p. 1.) In contrast, Del Mar Farms discharged to an agricultural drain, the Amaral Line, which has no beneficial uses and which reaches a water of the state (the San Joaquin River) after several other operations have used the water therein for irrigation, and the same line for their discharge. In addition, the percentage increase in turbidity in the Stanislaus ACL was in the thousands of percent range, while the alleged increase in each of the dates in question as it relates to ACL Complaint R5-2012-0515 was of far lower magnitude. Finally, the dischargers in the Stanislaus ACL violated turbidity standards in January and February of 2008 (at which point they were issued a CAO), again in February and May of 2009, before an ACL was ultimately issued, and again in January of 2010 while the ACL process was pending. In contrast, the alleged violations contained in ACL Complaint R5-2012-0515 are confined to a two month period, and measures were taken immediately after the growing season (i.e., installation of drip irrigation systems) to ensure reduced sediment loads the following year.

In sum, in the Stanislaus case a discharger covered by the Conditional Waiver facing allegations of far more severe turbidity violations in more sensitive areas was presented with an opportunity to respond and address those violations over a period of several years prior to the issuance of an ACL, and was only issued said ACL after similar violations occurred over a two year period. In this Del Mar Farms enforcement action, the Discharger was provided no opportunity to respond to a 13267 Order, a Cleanup and Abatement Order, or any other pre-liability written enforcement mechanism, is facing an ACL less than one year from the date of the initial investigation and alleged violation (and after the point at which the source of the alleged violations had already been addressed through installation of a drip irrigation system). This does not constitute fair and consistent implementation of the Enforcement Policy.

C. Challenge to the Basis for Penalty Calculations

As indicated in section A above, Del Mar Farms contends that the alleged violations contained in ACL Complaint R5-2012-0515 are not supported by the evidence identified in the ACL. To the extent that the Regional Board finds the evidence sufficient for one or all of the alleged violations, Del Mar Farms hereby objects to the penalty calculations set forth in Attachment G. Del Mar Farm's objections are specified here for the steps of concern.

1. Step 1 – Potential for Harm Calculation

With respect to the three alleged violations, Regional Board staff propose that under Step 1 the Discharge should be given scores of moderate, and moderate risk for Factors 1 and 2, respectively. Del Mar Farms objects to these scores. First, for Factor 1, ACL Complaint R5-2012-0515 cites to no evidence to explain why turbidity discharges at the levels that allegedly occurred from Del Mar Farms were a moderate threat to beneficial uses in the San Joaquin River. For each alleged event (May 19, July 6, and July 19), Attachment G makes general statements without providing any specificity or rationale as to why the alleged discharges were reasonably expected to moderately impact beneficial uses.

For all three events, Attachment G states:

The Discharger was given the score of 3 (moderate). A moderate score was given because the discharge impacts were observed, or reasonably expected to have a moderate impact to beneficial uses in the river and/or down-gradient water users, but without appreciable acute or chronic effects. (Attachment G, pp. 1, 3, 6.)

Considering the flow differentials between the irrigation return flow from Del Mar Farms and flows in the San Joaquin River on the three days in question (see Day Technical Memo, p. 6), it is difficult to conclude that discharges allegedly contributed by Del Mar Farms would in fact have any harm on beneficial uses, let alone “moderate” harm.

Next, with respect to Factor 2, Regional Board staff propose a score of 2, which is considered a “moderate risk” under this factor. The Enforcement Policy defines the score of 2 here as, “[d]ischarged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection).” (Enforcement Policy, p. 13.) To make this finding, Regional Board staff merely repeat the Enforcement Policy, and Attachment G states, “[t]he Discharger was given the score of 2 (moderate risk). A moderate score was given as the discharge appeared to pose a moderate risk or threat to potential receptors. The discharged material has some level of toxicity or poses a moderate level of concern regarding receptor protection.” (Attachment G, pp. 1, 3-4, 6.) However, like with Factor 1, Regional Board staff provide no specificity with respect to this finding and cite to no evidence to support this finding. Further, the information provided in Attachments A-F reference no toxicity data or information regarding receptors. Accordingly, ACL Complaint R5-2012-0515 contains no evidence to support a score of 2 for Factor 2 of Step 1. Considering the inappropriate scores for these two factors, the final scores for “Potential for Harm” for all three alleged events are not supported by any evidence, and at most should receive scores of 0.

2. Step 2 – Assessments for Discharge Violations

Under this step, Regional Board staff propose a “Deviation from Requirement” score of major for all three alleged discharge events. (Attachment G, pp. 2, 4, 6.) For the May 19 event, the rationale provided is that, “Del Mar Farms is an experienced grower, and as a current coalition member has knowledge of water quality issues and management practices.” (*Id.*, p. 2.) For the subsequent events, it appears to be based on prior notification and/or due to the fact that a citizen complaint occurred. (*Id.*, pp. 4, 6.) The prior notification in this case appears to be an informal, oral communication between Regional Board staff and Del Mar

Farm representatives at a Coalition meeting on June 1, 2011. Prior notification did not include any notice in writing, request for a technical report, or cleanup and abatement order as has occurred in other enforcement proceedings against irrigated agricultural operations for alleged turbidity violations. (See section B, above.) The Enforcement Policy describes the score of major in this step as applying when, “[t]he requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).” Such a description is not applicable here. As has been indicated previously, Del Mar Farms leased this property for the first time in late 2010, and had plans to install sub-surface drip irrigation for the 2012 growing season, which occurred. In other words, Del Mar Farms was in no way “disregarding the requirement” but was planning to install a drip system after the 2011 growing season. Further, as indicated in the Day Technical Memo, drip irrigation systems for a crop like tomatoes cannot be installed during crop production but must be installed after harvest. Thus, the Regional Board’s proposed Deviation from Requirement is inappropriate and should be disregarded.

3. Step 3 – Per Day Assessment for Non-Discharger Violations

Regional Board staff provide calculated flow rates for per gallon assessments under Step 3 of Attachment G. It is important to note that the calculated flow rates are from observations at the end-of-the-field, which is approximately four miles from the San Joaquin River. During that four mile stretch, others irrigate from and discharge into the Amaral Line. (See Day Technical Memo, pp. 4-5.) Thus, it is not known if the flow rates calculated at the end-of-the-field have any direct relationship to what is discharged into the San Joaquin River at the end of the Amaral Line. Accordingly, the per gallon assessment should be disregarded as being uncertain.

4. Step 4 – Adjustment Factors

In general, there are concerns with the scores proposed under Step 4 for the alleged July 6 and July 19 events. The most egregious error, however, appears under Step 4(a) for the July 19, 2011 event. Attachment G shows that a score of 1.2 was given, in part, because the discharge caused, all or in part, “a water quality objective violation as well as a nuisance condition to down-gradient water users.” This claim is problematic for several reasons. First, ACL Complaint R5-2012-0515 cites to no San Joaquin River data for July 19, 2011. Either samples were not taken, or the evidence was not provided as part of the ACL. In either case, there is no evidence to suggest that and/or sediment turbidity water quality objectives were exceeded on the day in question. Second, ACL Complaint R5-2012-0515 provides no evidence or rationale to allege that a nuisance condition occurred to down-gradient water users. For there to be a “nuisance,” the Water Code requires that the discharge (1) be injurious to health, or indecent or offensive to the senses, or obstruct the free use of property, so as to interfere with the comfortable enjoyment of life or property, (2) affect at the same time an entire community or neighborhood, or any considerable number of persons, and (3) occurs during, or as a result of the treatment or disposal of wastes. (Wat. Code, § 13050(m).) Attachment G, and ACL Complaint R5-2012-0515 as a whole, provides no information to show that there is a nuisance condition. In particular, no information is provided to explain how discharges from Del Mar Farms met the first two required prongs of nuisance. General allegations without supporting evidence cannot sustain the claims or findings contained in ACL Complaint R5-2012-0515.

5. Step 7 – Other Factors as Justice May Require

With respect to this step, Attachment G only considers the costs of investigation and disregards all other factors identified in the Enforcement Policy. Specifically, one other factor to be considered is that the “calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the same Enforcement Policy.” (Enforcement Policy, p. 19.) The facts presented in ACL Complaint R5-2012-0515 as compared to those in Order No. R5-2012-0029, adopted by the Regional Board on June 8, 2012, clearly indicate that the calculated amount of \$123,191 is entirely disproportionate to the \$10,000 assessed in Order No. R5-2012-0029. By way of comparison, the facts are as follows: both are tomato operations; both have alleged violations for sediment and/or turbidity; growers in Order No. R5-2012-0029 were assessed for two days of violations over two different growing seasons, Del Mar Farms is being fined for three days of alleged violations in one growing season; growers in Order No. R5-2012-0029 received a section 13267 Order, Del Mar Farms received an informal, oral communication at a general meeting; and, Del Mar Farms installed sub-surface drip irrigation for the following production year. In light of these comparable facts, the proposed penalty amount here is entirely disproportionate to assessments for similar conduct.

6. Step 8 – Economic Benefit

Of particular concern is the calculation of estimated economic benefit in Step 8. In ACL Complaint R5-2012-0515, Regional Board staff propose to calculate estimated economic benefit as \$46,000 because Del Mar did not install drip irrigation prior to the 2011 crop season. (Attachment G, p. 9.) This finding is problematic for several reasons. First, by way of comparison, in Order No. R5-2012-0029, Regional Board staff calculated the economic benefit as \$150. Further, in its calculation, staff determined it inappropriate to assume which best management practices (BMPs) would be applicable to the site. This finding with respect to determination of what BMP or BMPs should be employed is appropriate considering the statutory mandate of Water Code section 13360, which prohibits the Regional Board from dictating the manner of compliance. Regional Board staff applied no such reservation in ACL Complaint R5-2012-0515. Rather, in ACL Complaint R5-2012-0515, Regional Board staff concluded that sub-surface drip irrigation is the appropriate BMP and that failure to install the system for the previous crop year resulted in an estimated penalty of \$46,000. Such a penalty is purely punitive in nature and inappropriate. Moreover, it penalizes individuals who plan to install drip irrigation versus looking to use less expensive BMPs. Such a result would not appear to be in the Regional Board’s interest.

E. Witnesses

Should this matter proceed to hearing, Mike Day, principal author of the report attached hereto as Exhibit B, may testify at the Regional Board meeting tentatively scheduled for August 2/3, 2012. If Mr. Day testifies, his testimony will consist of an explanation of the findings contained in his report, the methods used in reaching the conclusions contained in that report, any conclusions or impressions he may have based upon his review of Regional Board records, CCID records, and his observation of how fields in the area are irrigated and drain. Mr. Day has 30 years of experience with irrigation and drainage and is an expert in this subject matter area. Mr. Day’s resume is attached hereto as Exhibit C. Should the respondent determine it appropriate for Mr. Day to testify, his testimony would take approximately 20 minutes for respondent’s case-in-chief.

CONCLUSION

Regional Board staff's decision to issue an ACL in this case is unwarranted and unsupportable for a number of reasons. First, it is unclear why Regional Board staff have pursued an ACL against Del Mar Farms in this instance without undertaking the variety of progressive steps generally used in cases involving similar alleged violations of the Conditional Waiver, including CAOs, NOV's, and all of the other indicia of executing a progressive enforcement policy. Second, even if Regional Board staff felt that an immediate ACL was warranted, the manner in which they analyzed Del Mar Farm's contribution was entirely inappropriate in that the ACL fails to account for or analyze the realities of drainage and irrigation along the Amaral Line, including the use of water from the line at other operations and the contribution of sediment from others to the Amaral Line. ACL Complaint R5-2012-0515 seeks to impose a large penalty based on arguably the cumulative discharge of multiple agricultural operations that share the Amaral Line. There is no indication that Regional Board staff attempted to distinguish between the precise volume of flow and precise levels of sediment attributable to Del Mar Farms and the volume of flow and sediment that is attributable to operations further down the Amaral Line. Third, ACL Complaint R5-2012-0515 itself is lacking sufficient evidence to demonstrate that water quality objectives were exceeded in the San Joaquin River, specifically as it relates to the absence of turbidity data on July 19, 2011, and that discharges from the Del Mar Farms' properties in question actually caused or contributed to a violation of an applicable objective. Fourth, the penalty itself does not comport with a fair and consistent application of the Enforcement Policy. As noted above, similar dischargers were given a significantly longer time period in which to address the sources of the turbidity exceedences, were subject to steps of progressive enforcement prior to being issued an ACL, and generally treated differently from Del Mar Farms throughout the enforcement process. Finally, ACL Complaint R5-2012-0515 is punitive in that it does not and cannot serve as a deterrent against future violations given that the Del Mar Farms' properties have already been converted to drip irrigation systems that significantly reduce potential sediment loading to discharge.

Given all of the above, Del Mar Farms strongly recommends that the Regional Board withdraw ACL Complaint R5-2012-0515.

Sincerely,



Theresa A. Dunham

Attachments: Exhibits A through E

cc: **Prosecution Team** (via email only: bstevens@waterboards.ca.gov):

Pamela Creedon, Executive Officer

Frederick Moss, Assist. Executive Officer

Joe Karkoski, Supervisory Water Resource Control Engineer

Brett Stevens, Sr. Environmental Scientist

Terry Bechtel, Environmental Scientist

Andrew Tauriainen, Sr. Staff Counsel (via email only: atauriainen@waterboards.ca.gov)

Bernard N. & Barbara C. O'Neill Trust (via mail)

Jon Maring, Del Mar Farms (via email only)

TAD/ADL:jlm/cr